Service Date: February 3, 2006

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation.	)))))	UTILITY DIVISION DOCKET NO. D2005.4.51 ORDER No. 6647a

FINAL ORDER

DIECA Communications, d/b/a Covad Communications Company (Covad) has petitioned the Montana Public Service Commission (MPSC or Montana Commission), pursuant to Title 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996 (Act), for arbitration of an unbundling dispute arising out of an interconnection agreement between Covad and Qwest Corporation ("Qwest").

I. BACKGROUND

Covad is a competitive local exchange carrier (CLEC) and Qwest is a Bell Operating Company (BOC) and incumbent local exchange carrier (ILEC). Covad has petitioned for a determination of the Montana Commission's jurisdiction and authority over a negotiated interconnection agreement (NIA) between Qwest and Covad (the Parties), insofar as Covad seeks enforcement of Qwest's continuing obligation to provide unbundled access to certain network elements pursuant to 47 U.S.C. § 271. See *Petition for Arbitration Pursuant to Section 252(B) of the Communications Action of 1934, as Amended* (filed April 11, 2005) (*Petition*). Specifically, Covad seeks a ruling that the Commission has the jurisdiction, pursuant to either the Act or state law, to require Qwest to unbundle the aforementioned § 271 network elements.

II. RELIEF REQUESTED

Covad petitions the Commission for a favorable interpretation of Commission jurisdiction and authority, such that Qwest could be ordered to unbundle the following elements contained in § 271(c)(2)(B)(iv) and (v):

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

See *Covad Initial Brief*, p. 2 (filed June 10, 2005)

Through negotiations marked by best efforts and good faith, the Parties were able to successfully negotiate all terms and conditions except for the aforementioned § 271 unbundling of certain network elements. As a result, Covad has requested determinations of the following two questions of law:

1. Does MPSC possess the authority, in conjunction with a § 252 arbitration of an interconnection agreement, to order Qwest, pursuant to § 271, to unbundle certain network elements?

2. Does MPSC have the authority to require Qwest to unbundle network elements pursuant to Montana law?

It is important to note that the *Petition* requests arbitration of only two narrowly drawn questions of law. The Montana Commission's understanding is that the resolution of these two questions will, in turn, effectively resolve any remaining issues that were not presented for arbitration.

III. DISCUSSION

a. Does MPSC possess the authority, in conjunction with a § 252 arbitration of an interconnection agreement, to order Qwest, pursuant to § 271, to unbundle certain network elements?

Covad argues in the first instance that the Montana Commission has the authority to arbitrate a § 271 dispute under the arbitration provisions of § 252. *Covad's Initial Brief*, pp. 3-10 (filed June 10, 2005). The Act, in relevant part, sets forth the rights, duties and obligations of states in their administration of 47 U.S.C. §§ 251 and 252, including the responsibility for arbitration of issues associated with the drafting of interconnection agreements. See 47 U.S.C. 252(b). Therefore, the question before the Montana Commission is whether its authority to conduct § 252 arbitrations extends to the arbitration of § 271 unbundling issues.

Qwest takes the position that "[n]either Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law." *Qwest Corporation's Response to DIECA Communications, Inc., d/b/a Covad Communications Company's Petition for Arbitration* p. 5 (filed May 2, 2005)(quoting *Utah Arbitrator's Report and Order*, p.20 (Utah PSC, February 8, 2005)).

Qwest points also to numerous commission decisions that have resolved the same or similar issues in its favor, and claims to be at a loss to explain why Covad accepted Qwest's identical language in a Colorado proceeding. See *Qwest Corporation's Reply Brief* at 1-2.

Although § 271 makes passing references to certain provisions of §§ 251 and 252, there is no indication that § 271 was intended to be part of the §§ 251/252 arbitration regime. Further, the FCC has recognized a clear distinction in the operation of Sections 251, 252, and 271:

> …it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to all incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs entry into the long distance market with increased presence of competitors in the local market.

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers / Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 / Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147* at ¶ 655 (Released August 21, 2003)(hereinafter *TRO*).

Finally, as Qwest has consistently argued, § 252(c), which sets the standards for arbitration, mentions only § 251: "Significantly, Congress neither directed nor authorized state commissions to resolve open issues relating to duties imposed by Section 271." See *Qwest Corporation's Response to Covad Communications Company's Third Notice of Supplemental Authority*, p.2 (Filed Dec. 21, 2005).

Indeed, Covad's argument fails on a plain reading of §§ 251, 252, and 271, as there is no explicit linkage between §§ 251-252 and § 271. Section 271 is the statutory provision that sets the standards and requirements for BOC entry into InterLATA services; while §§ 251 and 252 are the statutory provisions that set the parameters for ILEC-CLEC interconnection agreements,

including the concurrent obligation to provide unbundled access to network elements. See 47 U.S.C. 251 (c)(3).

While Covad is effectively precluded from using a § 252 arbitration to obtain an unbundling of § 271 network elements, the Federal Communications Commission (FCC) has established that BOCs, such as Qwest, do have an independent obligation to unbundle § 271(c)(2)(B) elements. See *TRO* ¶ 653. Therefore, Qwest is under a pre-existing obligation to unbundle these § 271 elements and, to the extent that Qwest has not fulfilled this obligation, Covad may pursue its administrative remedies with the FCC.

b. Does MPSC have the authority to require Qwest to unbundle network elements pursuant to Montana law?

Covad argues that the Montana Commission can use its unbundling rules to achieve what it cannot do under § 252. As discussed below, the Montana Commission does have unbundling authority independent of the Act, but this authority is available only to the extent that it isn't preempted by federal law. Federal preemption is determinative of a state's authority in those cases where state and federal law overlap. In relation to unbundling, the United States Court of Appeals for the D.C. Circuit has held that the FCC has exclusive jurisdiction over unbundling determinations pursuant to the Act. United States Telecom Ass'n v. F.C.C., 359 F.3d 554, 565-568 (D.C. Cir. 2004)(hereinafter *USTA II*).

As previously discussed, the FCC has made it clear that BOCs already possess an independent obligation to unbundle:

> …we continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

TRO at ¶ 653.[1]

USTA II preempts state action for most matters associated with the Act. The question thus becomes whether action taken pursuant to state law is preempted. The law in this respect is straightforward: where state enforcement activities do not impair federal regulatory interests,

[1] Qwest, which argues that it isn't required to provide elements for which there is no § 251 obligation (*Qwest's Initial Brief* at 7), is incorrect in respect to its independent unbundling obligations pursuant to § 271.

concurrent state enforcement is authorized. Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). Likewise, the Arizona Corporation Commission has held: "For the reasons described above we disagree that state law unbundling requirements are necessarily preempted under existing federal law…." *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Arizona Corporation Commission, Docket Nos. T-03632A-04-0425, T-01051B-04-0425, Recommended Decision of Administrative Judge, p.22 (Dec. 9, 2005)(*Arizona Arbitration Order*).[2] Qwest discounts the Arizona decision because it is an administrative judge's recommended decision that is currently under challenge. However, the Arizona reasoning is consistent with Florida Avocado Growers and, as is discussed below, is similarly consistent with the Maine Supreme Court's decision in Verizon New England, Inc. v. Maine Public Utilities Commission, 875 A.2d 118 (Maine 2005).

Presuming state action is not preempted, Covad argues that the Montana Commission has explicit authority under its own rules to compel Qwest to unbundle § 271 network elements, including loops and transport. See *Covad's Initial Brief* at 10. Qwest, on the other hand, quoting an FCC order[3], argues "…except in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters." See *Qwest's Initial Brief* at 12. However, both positions misplaced since the Montana Commission can in fact order an unbundling of network elements, but only to the extent that such unbundling does not interfere with, or otherwise impair the federal regulatory regime. Further, a § 252 arbitration, by definition, precludes arbitration of issues outside those issues identified in §§ 251 and 252.

That said, it should be noted that the Act expressly reserves certain state powers. For instance, Section 252(e)(3) of the Act empowers state commissions to enforce their respective state laws:

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[2] Notably, the Arizona Corporation Commission also held that "[s]ince Section 271 does not contain any separate provisions for approval of interconnection agreements or SGAT [Statement of Generally Available Terms and Conditions] provisions; it must be presumed that the review of such Section 271 provisions would occur within the Section 252 review process." *Arizona Arbitration Order* at 20.

[3] Memorandum Opinion and Order and Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-78 ¶¶ 25-30 (FCC rel. March 25, 2005).

> (3) Preservation of Authority.—Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements."

Further, the aforementioned § 253, provides:

> (b) State Regulatory Authority.—Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Qwest is correct in asserting that none of the Act's savings clauses apply directly to § 271. See *Qwest's Initial Brief* at 12-14. However, Qwest ignores the possibility that parties to an interconnection agreement can independently negotiate a § 271 unbundling.

In regard to § 271 and state action, Qwest makes the argument that "Covad's unbundling proposals also assume incorrectly that state commissions have authority to impose binding unbundling obligations under § 271." See *Qwest's Initial Brief* at 15. This argument ignores the fact that Montana does have the requisite authority to the extent that the state action does not impair or otherwise interfere with the federal regulatory regime. See Florida Avocado Growers v. Paul. The following Montana Administrative Rules (ARM) confers this authority:

> 38.5.4065 UNBUNDLING OF LOCAL EXCHANGE NETWORK ELEMENTS
>
> (1) Each incumbent LEC and interconnecting facilities-based new exchange carrier shall unbundle its local network elements. Network elements shall be unbundled at technically feasible points upon the bona fide request of a LEC. The requirement to fulfill all bona fide requests for the purchase of unbundled network elements by other LECs applies equally to incumbent LECs and new exchange carriers.
>
> (2) At a minimum LECs shall unbundle the local loop, network interface device, switching, transport, databases and signaling systems. Unbundling of networks shall include access to necessary customer databases, such as, but not limited to, 9-1-1 databases, billing name and address, directory assistance, local exchange routing guide, line information database and 800 databases. Unbundling shall also include operator services, directory assistance, and signaling system functionalities. If a LEC receives a bona fide request for the purchase of a network element, the LEC receiving the request for unbundling shall have the

> burden of proving that the provision of the network element is not technically feasible.

The Supreme Judicial Court of Maine recently faced a similar case in Verizon New England, Inc. v. Public Utilities Commission, 875 A.2d 118 (Maine 2005). The incumbent local exchange carrier (ILEC), Verizon, appealed a decision of the Maine Public Utilities Commission (MPUC), which ordered Verizon to provide CLECs with access to certain network elements. The Court held that while MPUC lacked authority under the Act to unbundle network elements, the Act did not preempt MPUC from unbundling network elements under state law. Verizon at ¶¶ 22-24.

In reaching its conclusion, the Maine Court addressed the question of preemption. The Court began by reciting the United States Supreme Court's test from Louisiana Public Service Commission v. F.C.C.:

> Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law, when there is an outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for States to supplement federal law, or where state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Verizon at ¶ 21 (quoting Cent. Me. Power Co. v. Town of Lebanon, 571 A.2d 1189, 1191 (Me. 1990)(quoting La. Pub. Serv. Comm. V. F.C.C., 476 U.S. 355, 368-69 (1986), cert denied, 501 U.S. 1230 (1991)).

In applying the Supreme Court's test, the Maine Court acknowledged that the Act was intended to create uniform standards for the telecommunications industry, but noted that "…it expressly preserved some authority in the states to regulate in this area." Verizon at ¶ 23.

While Montana law does provide for unbundling, Covad has not made a showing that CLECs are impaired in the absence of unbundling. Further, as the D.C. Circuit articulated in *USTA II*, impairment is not the sole factor when considering unbundling. In this regard, Covad did not offer sufficient evidence of economic factors such as the availability of elements from other sources and the impact on infrastructure investment. Lastly, while the Commission believes its authority to act pursuant to its own rules is greater than Qwest is willing to concede, the Commission recognizes that § 271 is largely the province of the FCC and is part of a

complex regulatory scheme. Recognizing this complexity, this Commission will not act in the absence of evidence that Commission intervention is required.

Findings of Fact

1. Covad Communications is a competitive local exchange carrier (CLEC).

2. Qwest Corporation is a regulated incumbent local exchange carrier (ILEC).

3. Covad Communications has petitioned for arbitration of its interconnection agreement with Qwest, pursuant to 47 U.S.C. 252 and Section 69-3-837, MCA.

4. No facts were presented that justify an unbundling, pursuant to state law (38.5.4065, ARM), of Section 271 network elements.

Conclusions of Law

1. The Montana Public Service Commission ("Commission") regulates the rates and services of public utilities. Title 69, Chapter 3, MCA.

2. The Commission has the authority to conduct arbitrations of open issues arising in the course of the negotiation of interconnection agreements. 47 U.S.C. 252 and Rule 38.5.4012, ARM.

3. The Commission does not have the jurisdiction or authority to arbitrate a Section 271 dispute under Section 47 U.S.C. 252.

4. The Commission has the authority, pursuant to state law (38.5.4065, ARM), to require Qwest to unbundle elements in those cases where state action is supported by the facts and is not inconsistent with the federal regulatory scheme.

5. Pursuant to the Triennial Review Order, ¶ 653 and ¶ 655, Qwest is obligated to fulfill its Section 271 obligation to provide unbundled access to loops, switching, transport, and signaling regardless of any unbundling analysis under Section 251.

Order

1. The Parties shall complete their negotiated interconnection agreement in a manner consistent with the above Conclusions of Law.

2. The Montana Public Service Commission shall retain jurisdiction over this arbitration until such time as the Parties submit, and the Commission approves, pursuant to Section 252(e), an amended and compliant negotiated interconnection agreement.

DONE AND DATED this 8th day of January 2006, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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GREG JERGESON, Chairman

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BRAD MOLNAR, Vice-Chairman

_____
DOUG MOOD, Commissioner

_____
ROBERT H. RANEY, Commissioner

_____
THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Judy Scheier
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.